**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 21, 2003**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1402

BROSNAHAN BUILDERS, INC.;
KEVIN BROSNAHAN; LINDA BROSNAHAN,

Appellants,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY

Appeal from the United States District Court
for the District of Delaware
(Civ. No. 00-cv-00339)
District Court: Hon. Sue L. Robinson

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 17, 2002

Before: NYGAARD, ALITO and McKEE, *Circuit Judges.*

(Filed January 21, 2003)

*Appendix A*

OPINION

McKEE, *Circuit Judge.*

Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan (collectively "Brosnahans") appeal the district court's grant of summary judgment to Harleysville Mutual Insurance Company. We will affirm.

I.

The Brosnahans, who are in the business of building single-family homes, filed this action in the district court on March 24, 2000, seeking a declaratory judgment that Harleysville, their commercial general liability insurer, must defend them in an underlying lawsuit, *Pinkert v. John H. Olivieri, P.A.*, Civ. No. 99-380 (the "*Pinkert* complaint"), which was filed in the district court on June 16, 1999. The *Pinkert* complaint alleged breach of contract and several counts of fraud arising out of a claim of defective workmanship by the Brosnahans under a contract to build a home for the Pinkerts in Bethany Beach, Delaware, and it requested recovery of damages for the cost of repairing and replacing the allegedly shoddy workmanship the Brosnahans performed.

In the *Brosnahan* declaratory judgment action, the parties eventually filed cross-motions for summary judgment. On March 30, 2001, the district court denied the Brosnahans' motion and granted Harleysville's motion. The court held that the *Pinkert* complaint did not contain allegations of "property damage" caused by an "occurrence" because it

alleged breach of contract and claims of defective workmanship. Accordingly, the court concluded that the allegations did not trigger any duty to defend under plaintiffs' commercial general liability policy. The district court also found that Exclusions k(5) and (n) applied to bar coverage to the Brosnahans, thus precluding any duty to defend the Brosnahans at the outset of the *Pinkert* litigation. *Brosnahan Builders, Inc. v. Harleysville Mutual Ins. Co.*, 137 F.Supp.2d 517, 527-28 (D. Del. 2001).

The Brosnahans later moved to amend the judgment, but the district court denied the motion. Prior to the court's denial of that motion Harleysville entered into a settlement agreement with the Pinkerts to dismiss all claims against the Brosnahans in exchange for a payment of $170,000 pursuant to its previously issued reservation of rights. The Brosnahans then argued that Harleysville had waived its right to contest its initial duty to defend them in the underlying action because of its participation in the settlement. The district court disagreed, holding that Harleysville's "indemnification of [the Brosnahans] . . . does not constitute a clear waiver of [Harleysville's] challenge to the duty to defend." Dist. Ct. Order of Jan. 18, 2002 (App. at 27). This appeal followed.

Our review of the district court's grant of summary judgment is plenary. *Huang v. BP Amoco Corp.*, 271 F.3d 560, 564 (3d Cir.2001). In its Memorandum Opinion, the district court carefully and completely explained its reasons for finding that Harleysville had no duty to defend the Brosnahans in the underlying *Pinkert* action, and we can add little to the district court's thoughtful analysis. Accordingly, we will affirm the district court's grant of summary judgment

to Harleysville substantially for the reasons set forth in the district court's Memorandum Opinion without further elaboration.

We will also affirm the district court's finding that Harleysville's participation in the settlement pursuant to its reservation of rights does not constitute a waiver of its right to contest its initial duty to defend the Brosnahans in the underlying *Pinkert* action. When first made aware of the *Pinkert* complaint, Harleysville disclaimed coverage based upon its belief that the allegations of the complaint did not trigger a duty to defend. Nonetheless, the Brosnahans and Harleysville executed a non-waiver agreement which permitted Harleysville to investigate the Pinkerts' claim and reserved all of Harleysville's rights under the commercial general liability policy. When the Brosnahans filed a third-party complaint against subcontractors in October of 2000, Harleysville was presented for the first time, through the averments in the third-party complaint, with the possibility that subcontractors negligently and accidentally caused damage to the building. At that point, Harleysville, although not bound to do so by the reservation of rights and non-waiver agreement, undertook the defense of the Brosnahans. Based on information Harleysville developed in the course of the representation, viz., that a previously unidentified subcontractor negligently attached drainpipes to the building roof scuppers in a manner which caused water damage to the interior of the building, Harleysville settled the *Pinkert* action on behalf of the Brosnahans pursuant to its reservation of rights and non-waiver agreement. However, Harleysville did not waive its right to contest any duty to defend from the time of the filing of the *Pinkert* complaint to the date of the assumption of the defense.

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II.

For the above reasons, we will affirm the district court.

TO THE CLERK OF THE COURT:

Please file the foregoing Opinion.

/s/ Theodore A. McKee
Circuit Judge

## APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED MARCH 30, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 00-339-SLR

BROSNAHAN BUILDERS, INC.,
KEVIN BROSNAHAN and LINDA BROSNAHAN,

Plaintiffs,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Defendant.

Dated: March 30, 2001
Wilmington, Delaware

### MEMORANDUM OPINION

SUE L. ROBINSON, Chief Judge

### I. INTRODUCTION

Plaintiffs Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan filed this action on March 24, 2000 seeking a declaratory judgment that their general liability insurer, defendant Harleysville Mutual Insurance Company, must defend them in an underlying lawsuit, *Pinkert v. John*

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*H. Olivieri, P.A.*, No. 99-380-SLR, filed in this court on June 16, 1999.[1] Plaintiffs also allege breach of contract, bad faith breach of contract, and breach of the contractual duty of fair dealing. The court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1332. Currently before the court are plaintiffs' motion for summary judgment on the duty to defend (D.I. 12), and defendant's cross-motion for summary judgment on the duty to defend and indemnify (D.I. 16). For the reasons that follow, the court shall grant defendant's cross-motion for summary judgment on the duty to defend[2] and deny plaintiffs' motion for summary judgment.

## II. BACKGROUND

Plaintiff Brosnahan Builders, Inc. ("Brosnahan Builders") is a Delaware corporation whose primary business is the construction of single-family housing. Plaintiffs Kevin and Linda Brosnahan, husband and wife, are the owners and sole operators of Brosnahan Builders. (D.I. 1 at ¶¶ 5-7) Defendant Harleysville Mutual Insurance Company is a mutual company

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1. In October 2000, defendant agreed to defend plaintiffs in the *Pinkert* case, although reserving its rights to withdraw from all or part of the defense pending the court's decision on this motion. (D.I. 28) Plaintiffs still seek costs for defending the *Pinkert* action prior to October 2000, for which defendant has not agreed to reimburse plaintiffs.

2. The court's determination that defendant has no duty to defend plaintiffs renders defendant's arguments supporting limited indemnification and apportionment of costs moot. Plaintiffs' remaining claims in this action are based on the duty to defend and are also moot, as is plaintiffs' conditional motion for summary judgment on bad faith. (D.I. 40)

organized under the laws of Pennsylvania, primarily engaged in the business of insurance. (D.I. 4 at ¶¶ 8) Defendant is regularly engaged in the sale of insurance products in Delaware, and through those operations came to be plaintiffs' general liability insurer. (*Id.* at ¶ 9)

**A. The Insurance Policy**

Defendant issued to plaintiffs its policy no. CB-8A4826 (the "Policy") for an initial annual period from March 25, 1992 through March 25, 1993, and continuing thereafter on an annual renewal basis through at least March 25, 2000. (D.I. 14 at A1) The Policy provides both property insurance and Comprehensive Business Liability insurance, the latter provided with limits of $1 million for each occurrence, $2 million in the aggregate for injury or damage generally, and $2 million in the aggregate for injury or damage that comes within the Policy's "products — completed operations hazard" definition. (*Id.* at A66) The Policy designates as an insured the executive officers and directors of Brosnahan Builders "with respect to their duties as . . . officers or directors." (*Id.* at A99) It also designates as insureds any employees of the company "for acts within the scope of their employment." (*Id.*)

The Policy requires defendant to defend any "suit" that seeks damages because of "property damage" that occurs during the Policy's period and is caused by an "occurrence." (D.I. 18 at B41) A "suit" is defined as "a civil proceeding in which damages because of . . . property damage . . . to which this insurance applies are alleged." (*Id.* at B52) "Property damage" is "[p]hysical injury to tangible property, including

all resulting loss of use of that property; or [l]oss of use of tangible property that is not physically injured." (*Id.*) The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.*)

The Policy then lists several exclusions to illustrate situations when the business liability coverage does not apply. Those pertinent to this case include:

> a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.
>
> j. "Bodily injury" or "property damage" due to rendering or failure to render any professional service. This includes but is not limited to:
>
> (1) Engineering, drafting, architectural, legal, accounting or advertising services;
>
> (2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications.
>
> (3) Supervisory, inspection or engineering services;
>
> (4) Any cosmetic or tonsorial service or treatment;

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(5) Optometry or optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;

(6) Ear piercing services; and

(7) Services in the practice of pharmacy; but this exclusion does not apply to an insured whose operations include those of a retail druggist or drugstore.

k. "Property damage" to:

(5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work"[3] was incorrectly performed on it.

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3. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

(Cont'd)

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Paragraph (6) of [exclusion "k"] does not apply to "property damage" included in the "products-completed operations hazard."[4]

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(Cont'd)

"Your work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in "a" or "b" above.

(D.I. 18 at B53)

4. "Products — Completed Operations Hazard" includes all "bodily injury" and "property damage" arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned.

The "bodily injury" or "property damage" must occur away from premises you own or rent, unless your business includes the selling, handling or distribution of "your product" for consumption on premises you own or rent.

"Your work" will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

(2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.

(Cont'd)

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1. "Property damage" to "your product"[5] arising out of it or any part of it.

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(Cont'd)

(3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or sub-contractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

(D.I. 18 at B52)

5. "Your Product" means:

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(1) You;

(2) Others trading under your name; or

(3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in "a" and "b" above.

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m. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard." This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

n. "Property damage" to "impaired property"[6] or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

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6. "Impaired Property" is tangible property, other than "your product" or "your work" that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

If such property can be restored to use by:

(1) The repair, replacement, adjustment or removal of "your product" or "your work"; or

(2) Your fulfilling the terms of the contract or agreement.

(D.I. 18 at B-50)

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of a sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

o. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product,"

(2) "Your work," or

(3) "Impaired property;"

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

(*Id.* at B44-B45)

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**B. The *Pinkert* Litigation**

In September 1997, Brosnahan Builders was hired by Michael and Eleanor Pinkert ("the Pinkerts") to construct a residential home in Bethany Beach, Delaware. Construction began in approximately September 1997 and continued through approximately April 1999. (*Id.* at A11-A12)

Defendant received notice of a claim in late January 1999, in which the Pinkerts alleged that the work performed by plaintiffs on their home was defective. (D.I. 14 at A7) Consequently, plaintiffs and defendant executed a "Non-Waiver Agreement" which permitted defendant to investigate the Pinkerts' claim and reserved all of defendant's rights under the Policy. (D.I. 18 at B58-B59) In a written disclaimer dated February 24, 1999, defendant stated that it would not defend plaintiffs because plaintiffs' "work" and "product" were not covered under the Policy. (*Id.* at A7)

On June 16, 1999, the Pinkerts filed a lawsuit against plaintiffs, among others, seeking damages and other relief in connection with the construction of their home. The allegations directed at Kevin and Linda Brosnahan arise from their duties as officers of Brosnahan Builders and from acts within the scope of their employment. (*Id.* at A10-A26) The *Pinkert* complaint seeks damages against plaintiffs for breach of contract, fraud, equitable fraud, and violations of the Consumer Fraud Act.[7] Specifically, the complaint alleges the following:

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7. The counts alleging fraud (V, VI, VII) claim that: (1) plaintiffs "made false representations of material facts," (2) they "knew the

(Cont'd)

> 13. In response to [the Pinkerts' concerns about water and moisture penetration, the architect's] design required the use of above-standard construction measures and materials that would limit water and moisture penetration, including the installation of an expensive "Griffolyn" building wrap system that is more typically used in commercial projects. [The architect] also provided details for aluminum flashing around all doors and windows and roof vents to deflect or remove moisture that might get in the walls. In addition, extensive use of fiberglass was specified on the roof and decks with specific details given in the plans and specifications calling

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(Cont'd)

representations were false or recklessly disregarded the truth of the representations," (3) they "made the representations with the intent to induce [the Pinkerts] to pay for the work allegedly performed," and (4) "as a proximate and foreseeable result of [plaintiffs'] misrepresentations, [the Pinkerts] incurred damages." (D.I. 14 at A20-A23)

The counts alleging violation of Delaware's Consumer Fraud Act, 6 Del. C. § 2513, (IX, X, XI) claim that: (1) plaintiffs "made false or misleading representations of material facts in connection with the sale of construction services to [the Pinkerts]," (2) they "suppressed or omitted material facts, creating a condition of falseness, in connection with the sale of construction services to [the Pinkerts]," (3) they "made the representations, suppressions, or omissions with the intent to have [the Pinkerts] rely on them," and (4) "as a proximate and foreseeable result of plaintiffs' misrepresentations, suppressions, and omissions, [the Pinkerts] incurred damages." (*Id.* at A25-A29)

for the fiberglass to be run a minimum of eight inches up all walls to ensure that wind driven water would not get behind the fiberglass. These are all *critical* design elements of the house that were discussed in the early planning stages with [the architect], and later with Defendant Brosnahan, the construction contractor.

. . .

15. Construction of the residence began during September 1997 and continued through April 1999. During construction, both the architect and the contractor were aware of construction deficiencies relating to water and moisture proofing. These deficiencies included missing flashing, fiberglass installation at less than the specified height, and improper installation of the Griffolyn wrap system. Notwithstanding this knowledge, the architect and the contractor repeatedly assured the Plaintiffs, both orally and in writing, that these problems were, or would be, corrected.

. . .

22. After examining [certain leaks that developed after the Pinkerts moved into the residence], Defendant Kevin Brosnahan admitted the following:

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(a) The Griffolyn system installed was not the one specified;

(b) Mastic tape, which is an integral part of the Griffolyn water proofing system, was not used anywhere on the house; and

(c) There was no aluminum flashing around any of the windows that leaked.

(D.I. 14 at A12-A13)

On July 7, 1999, after reviewing the complaint, defendant again confirmed its decision not to defend plaintiffs, and reserved its right to rely on any other Policy exclusions whether or not they were previously mentioned. (*Id.* at A30-A44) On October 4, 1999, defendant's attorney wrote to plaintiffs' attorney, reiterating defendant's conclusion that the claim was not covered under the Policy. (D.I. 14 at A50)

On July 12, 2000, plaintiffs filed a third party complaint against various subcontractors alleging that some of the construction defects claimed by the Pinkerts were the responsibility of the subcontractors. (D.I. 28) On October 16, 2000, defendant undertook plaintiffs' defense in the *Pinkert* action, subject to the court's determination of the existence of a duty to defend and a reservation of rights to deny indemnification. (*Id.*)

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## III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Horowitz v. Fed. Kemper Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled

to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## IV. DISCUSSION

This case raises issues of contract construction which are questions of law to be addressed by the court. *See Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991). The parties agree that Delaware law must be applied to the case. *See Chesapeake Util. Corp. v. Am. Home Assur. Co.*, 704 F. Supp. 551, 556 (D. Del. 1989) (holding that under choice of law rules for contract disputes in Delaware, court must apply law of state of location of insured property in liability coverage dispute). Upon reviewing the Policy and the *Pinkert* complaint, the court concludes that defendant does not have a duty to defend plaintiffs in the *Pinkert* litigation either because the claim is not covered by the Policy or because the claim falls under Policy Exclusions "j", "k(5)" or "n".

### A. The Claim is Not Covered By the Policy Because the Damage Was Not Caused By An "Occurrence"

The insured bears the burden of proving that a claim is covered by an insurance policy. *See New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1181 (3d Cir. 1991). Under Delaware law, an insurer has a duty to defend the insured if the allegations in the underlying complaint fall within the terms of the insurance policy. *See Continental Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974). The test is whether the underlying complaint, read as a whole, alleges a risk within

the coverage of the policy. *See id.* at 105. The Delaware Supreme Court has articulated the following principles to be applied when performing this analysis:

> (1) when there exists some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured;
>
> (2) any ambiguity in the pleadings should be resolved in favor of the insured;
>
> (3) if even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend arises.

*See id.* at 105.

Thus, in Delaware, an insurer's duty to defend its insured arises when the allegations of the underlying complaint show a **potential** that liability within coverage will be established. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11, 1992 WL 22690, at *7 (Del. Super. Ct. Jan. 16, 1992). *See also C.H. Heist Caribe Corp. v. Am. Home Assur. Co.*, 640 F.2d 479, 483 (3d Cir. 1981) (stating that duty to defend arises "if the allegations of the complaint state on their face a claim against the insured to which the policy potentially applies," and that "the factual allegations of [the third party's] complaint against [the insured] are controlling") (citation omitted) (emphasis in original); *New Castle County v. Hartford Accident and Indem. Co.*, 673 F. Supp. 1359, 1367 (D. Del. 1987)

(recognizing that under Delaware law "insurers are required to defend any action which potentially states a claim which is covered under the policy").

The Policy states that defendant must defend any "suit" against plaintiffs that seeks damages because of "property damage" that is caused by an "occurrence." The parties agree that the Pinkerts have filed a "suit" against plaintiffs because of "property damage." The parties disagree on whether that "property damage" was caused by an "occurrence." The Policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Therefore, the court must determine whether the damage to the Pinkerts' home was caused by an "accident."

In *State Farm Fire and Cas. Co. v. Hackendorn*, 605 A.2d 3, 8 (Del. Super. Ct. 1991), a case concerning coverage under a homeowners' policy where the claim involved bodily injury from a gunshot, the court stated that in defining an accident, an incident must be examined by "(1) taking the point of the injured person and/or (2) looking at the insured's conduct." The court also cited Black's Law Dictionary, which states that in the context of accident insurance contracts, "[a]n accident . . . is an event happening without human agency, or, if happening through such agency, an event, which under circumstances, is unusual and not expected by the person to whom it happens." *Id.* at 7. *See also Camac v. Hall*, 698 A.2d 394, 396 (Del. Super. Ct. 1996). Although the underlying claim and insurance policy in *Hackendorn* are different than those in the case at bar, the general principle is equally applicable here.

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The Pinkerts allege breach of contract and several counts of fraud arising out of a claim of defective workmanship by plaintiffs. Specifically, the Pinkerts claim that plaintiffs were directed to install specific water proofing materials and failed to do so, and that the materials used were installed improperly. The Pinkerts also claim that plaintiffs misrepresented, either intentionally or with reckless disregard, the nature of their workmanship. The situation that led to the damage to the Pinkerts' home was clearly within the control of plaintiffs, as general contractor of the construction project, and not a fortuitous circumstance happening "without human agency." The "property damage" to the Pinkerts' home was not caused by an "occurrence" and, therefore, the claim is not covered under the Policy.

**B. Even If Covered Under the Policy, the *Pinkert* Claim Falls Under Certain Policy Exclusions**

Even if coverage were established, an insurer will be excused from its duty to defend if, as a matter of law, policy exclusions or exemptions apply. *See Rhone-Poulenc*, 1992 WL 22690, at *8. The burden is on the insurer to establish that policy exclusions apply in a particular case, and that they are subject to no other reasonable interpretation. *See Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569, 571 (Del. Super. Ct. 1997). Therefore, in order to avoid the duty to defend, the insurer must demonstrate that the allegations of the underlying complaint are "solely and entirely" within specific and unambiguous exclusions from coverage. *Rhone-Poulenc*, 1992 WL 22690, at *8. The parties

dispute seven Policy exclusions that are potentially relevant to the case at bar.[8] The court will address each exclusion *seriatim*.

### 1. Exclusion "a" Does Not Apply to the Claim

Exclusion "a" states that any claim for "property damage" that is "expected or intended from the standpoint of the insured" is excluded from coverage. Damage is not "intended" if the allegations of the underlying complaint allege civil recklessness. *See Capano Mgmt. Co. v. Transcon. Ins. Co.*, 78 F. Supp. 2d 320, 330 (D. Del. 1999). "Expected" can be defined as a "substantial probability," and requires more than a "reasonable foreseeability." *New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800, 813 (D. Del. 1989). *See also Farmer in the Dell Ent. v. Farmers Mut. Ins.*, 514 A.2d 1097, 1100 (Del. 1986) ("Where the tortfeasor clearly lacks the intent to inflict any damage or injury, and it is not foreseeable that damage will occur, the exclusion will not apply."); *Rhone-Poulenc*, 1992 WL 22690, at *16 ("The specific allegations of negligence indicate a potential for coverage and therefore militate against a conclusion as a matter of law that [the insured] expected or intended to discharge a pollutant.").

In the case at bar, the Pinkerts allege that plaintiffs committed fraud because they either "knew the representations were false **or recklessly disregarded** the truth of the representations." In other words, the plaintiffs can be liable

8. The court finds no evidence of a clear waiver by defendant of any rights under the Policy. The court, therefore, will address the exclusions raised by the parties in their briefs.

for fraud and breach of contract without **intending** to cause the property damage. Although the Pinkerts allege that the damage to their home was "a proximate and foreseeable result" of plaintiffs' misrepresentations, the court is not persuaded that if plaintiffs acted recklessly, they would expect the damage to be a "substantial probability." Therefore, the court concludes that since the *Pinkert* complaint alleges liability without intent, Exclusion "a" does not apply. *See, e.g., Ash/Ramunno Assoc. v. Nationwide Mut. Fire Ins. Co.*, No. 95C-11-158, 1996 WL 658819, at *2 (Del. Super. Oct. 22, 1996) (holding that since there was question of fact as to whether insured's actions were intentional or negligent, insurer had duty to defend).

**2. Exclusion "j" Applies to the Claim**

Exclusion "j" states that a claim for "property damage" due to "rendering or failure to render any professional service" is excluded from coverage. Examples of such professional services include "supervisory, inspection or engineering services." Plaintiffs, as general contractor of the Pinkerts' construction project, were directly responsible for supervising and inspecting the work of the subcontractors to ensure that the home was built properly and in accordance with the terms of the contract. Therefore, since plaintiffs failed to install the correct waterproofing materials, or ensure that the subcontractors did so, plaintiffs did not adequately render a "professional service" and Exclusion "j" applies to the claim.

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### 3. Exclusion "k(5)" Applies to the Claim[9]

This exclusion applies to property damage to "real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the property damage arises out of those operations." The Pinkerts' home is considered "real property," and plaintiffs, themselves or through subcontractors, were performing "operations" on that property. The "property damage" to the Pinkerts' home resulted from the defective "operations" of plaintiffs or their subcontractors. Therefore, Exclusion "k(5)" applies to the claim and excludes it from coverage under the Policy.[10]

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9. Exclusions "k" through "o" are commonly referred to as "business risk exclusions," which "are designed to protect insurers from contractors' attempts to recover funds to correct deficiencies caused by the contractors' questionable performance. Their use demonstrates the insurers' belief that the cost of not performing well is a cost of doing business and not considered part of the risk sharing scheme for which general liability policies are written. . . . The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." *Vari Builders, Inc. v. U.S. Fid. and Guar. Co.*, 523 A.2d 549, 551 (Del. Super. Ct. 1986).

10. The parties also disagree on whether Exclusion "k(6)" applies to the claim. The court concludes that because Exclusion "k(6)" does not apply to completed work, and the Pinkerts' home was complete when the property damage occurred, Exclusion "k(6)" does not exclude the claim from coverage under the Policy.

**4. Exclusion "l" Does Not Apply to the Claim**

Exclusion "l" applies to property damage to "your product" arising out of it, but "your product" does not include "real property." Because the Pinkerts' home is considered "real property," the court concludes that Exclusion "l" does not apply.

**5. Exclusion "m" Does Not Apply to the Claim**

Exclusion "m" excludes from coverage a claim arising out of property damage to "your work" and included in the "products-completed operations hazard." However, the exclusion does not apply if the damaged work was "performed on your behalf by a subcontractor." The construction of the Pinkerts' home clearly qualifies as "your work," and was completed at the time of the damage, as required by the "products-completed operations hazard." The *Pinkert* complaint, however, does not state that the specific work was performed by subcontractors. Because the court must consider only the allegations in the complaint, Exclusion "m" excludes the claim from coverage under the Policy.[11]

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11. Plaintiffs argue that because the *Pinkert* complaint is silent as to the role of subcontractors, the court may go beyond the four corners of the complaint to consider an affidavit by Kevin Brosnahan. Even if the court is allowed to consider this affidavit, however, the court finds it inconclusive. Kevin Brosnahan does not state that all of the work that led to the property damage suffered by the Pinkerts was performed solely by subcontractors. (D.I. 14 at A139-A141)

### 6. Exclusion "n" Applies to the Claim

Exclusion "n" excludes from coverage damage to "impaired property" or undamaged property that has an inherent defect or is not in accordance with the terms of a contract. The court concludes that the Pinkerts' residence is tangible property that is less useful because it incorporates deficient "work" by plaintiffs or is in violation of a contract, and can be restored to use by plaintiffs. Because the Pinkerts' residence is "impaired property," Exclusion "n" applies to the claim and excludes it from coverage under the Policy.

### 7. Exclusion "o" Does Not Apply to the Claim

Exclusion "o" is commonly known as the "sistership exclusion," and "operates to bar coverage for costs associated with the recall or removal of the product from the marketplace." *Hoechst Celanese Corp. v. Nat'l Union Fire Co. of Pittsburgh, PA.*, No. 89C-SE-35, 1994 WL 721631, at *2 (Del. Super. Apr. 13, 1994). The court concludes that this exclusion is not relevant to the case at bar, as the Pinkerts have not alleged damages for removal of the product from the market.

## V. CONCLUSION

For the reasons stated, defendant's cross-motion for summary judgment on the duty to defend is granted, and plaintiffs' motion for summary judgment is denied. An appropriate order shall issue.

**APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DENYING MOTION TO ALTER OR AMEND THE JUDGMENT, DATED JANUARY 18, 2002**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 00-339-SLR

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN and LINDA BROSNAHAN,

Plaintiffs,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Defendant.

**ORDER**

At Wilmington, this 18th day of January, 2002, having reviewed plaintiffs' motion to alter or amend the judgment (D.I. 60) and the papers submitted in connection therewith;

IT IS ORDERED that plaintiffs' motion is denied for the reasons that follow:

1. The actions allegedly taken by plaintiffs, as stated in the Pinkerts' complaint, did not lead to an injury of an accidental or fortuitous nature. Rather, the Pinkerts claimed

that plaintiffs failed to comply with their contractual obligations. Thus, the property damage suffered by the Pinkerts was not caused by an "occurrence," and plaintiffs' claim is not covered under the insurance policy.

2. Alternatively, plaintiffs' claim is excluded from coverage pursuant to Exclusions "k(5)," "m" and "n" of the insurance policy, for the reasons stated in the court's March 30, 2001 memorandum opinion.[1]

IT IS FURTHER ORDERED that plaintiffs' motion for leave to file a supplemental submission (D.I. 74) is granted, although the court finds that defendant's indemnification of plaintiffs, similar to defendant's assumption of plaintiffs' defense against the Pinkerts' lawsuit, does not constitute a clear waiver of defendant's challenge to the duty to defend.

IT IS FURTHER ORDERED that plaintiffs' motion to strike an unauthorized surreply brief (D.I. 69) is denied as moot.

s/ Sue L. Robinson
United States District Judge

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1. Upon review of the deposition testimony of James Zoerkler, defendant's corporate designee, the court finds that Exclusion "j" does not apply in the present case because the mere installation of construction materials or general oversight of subcontractors does not constitute a "professional service." (D.I. 61, Ex. A at 129-35)

**APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED MARCH 6, 2003**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 02-1402

BROSNAHAN BUILDERS, INC.;
KEVIN BROSNAHAN;
LINDA BROSNAHAN,

Appellants

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY

**SUR PETITION FOR REHEARING EN BANC**

BEFORE: BECKER, SLOVITER, SCIRICA, NYGAARD ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES and SMITH *Circuit Judges*

The petition for rehearing filed by the Appellants in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc and panel rehearing is hereby **DENIED.**

*Appendix D*

**IT IS SO ORDERED.**

By the Court,

s/ Theodore A. McKee
Hon. Theodore A. McKee
Circuit Judge

Dated: March 6, 2003